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No. 02-1809

# In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

*Petitioner,*

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Was the petition for certiorari jurisdictionally out of time?

2. Is district court jurisdiction in this case barred by the Tax Injunction Act or principles of federal-state comity?

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents Kathleen M. Winn, et al., respectfully request that this Court deny the petition for writ of certiorari. The court of appeals' judgment was entered on October 3, 2002. The petition for writ of certiorari was filed eight months later, on June 3, 2003. No extension of time to petition for certiorari was sought or granted and no timely petition for rehearing or rehearing en banc was filed in the court of appeals'. The petition is therefore jurisdictionally untimely. The decision below is, moreover, clearly correct and consistent with the overwhelming majority of lower-court decisions as well as this Court's decisions. The recent contrary decision of the Fifth Circuit, rendered after the decision below in this case, is an anomaly that does not create a substantial conflict warranting this Court's review.

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this case on October 3, 2002. Pet. App. 11. No petition for rehearing or rehearing en banc was filed by petitioner within the 14-day period provided by Rule 40(a)(1) of the Federal Rules of Appellate Procedure,[1] nor did petitioner make a request for an

[1] Petitioner labeled its response to the court of appeals' November 13 request for supplemental briefing (*see* below) regarding the appropriateness of rehearing en banc as a "Petition for Rehearing and Rehearing *En Banc*." That document, however, was filed on December 27, 2002, long after the expiration of the time to petition for rehearing had expired. The court of appeals never responded to this December 27 "petition."

extension of time within which to file a rehearing petition. Petitioner did not move to stay the court of appeals' mandate while petitioner sought certiorari. The court of appeals' mandate was accordingly issued on October 25, 2002, and costs were taxed. No petition for certiorari was filed during the ninety-day period provided for that purpose by 28 U.S.C. § 2101(c) and this Court's Rule 13.

On October 28, 2002, the Clerk of the Ninth Circuit filed the following order: "The mandate issued on October 25, 2002 in the above captioned appeal was in error and is RECALLED." Op. App.[2] 1, *infra*. Thereafter, on November 13, 2002, the court of appeals' panel that had heard and decided the case directed the parties to file briefs "setting forth their respective positions on whether this case should be reheard en banc." Op. App. 2, *infra*. Subsequently, on March 5, 2003, the court filed an order reciting that "[a] judge requested a vote on whether to rehear this matter en banc," that "the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration" and that "[t]he request for rehearing en banc is denied." Pet. App. 1. Judge Kleinfeld, joined by Judge O'Scannlain, dissented from the denial of rehearing en banc. Pet. App. 2-App. 10.

The present petition for writ of certiorari was filed on June 3, 2003, eight months after the court of appeals'

[2] "Op. App." cites are to the Appendix to this Brief in Opposition. On January 17, 2003, petitioner filed a motion for clarification in the court of appeals, asking the court to clarify whether its order recalling the mandate and the court's subsequent order directing the parties to file supplemental briefs suspended the finality of the judgment. The Clerk of Court responded by letter on February 7, 2003, that finality had been suspended.



judgment was entered. Since no timely rehearing petition was filed in the court of appeals, the petition for certiorari was not filed within the time limit prescribed by statute and this Court's rules. 28 U.S.C. § 2101(c) and U.S. Sup.Ct. Rules 13.1, 13.2 and 13.3. The Court consequently lacks jurisdiction.

## STATEMENT

1. *The Arizona Tax-Credit Program.* – This case involves an Establishment Clause challenge to an Arizona statute, Ariz. Rev. Stat. § 43-1089[3] that, by means of state income-tax credits, uses state tax revenues to fund religious primary and secondary school education. Under the statute, all individual state taxpayers, whether or not they have children in school, may satisfy part or all of their annual state income-tax liability by transferring up to $500[4] of the amount owed to the state each year for income taxes to a "school tuition organization" (STO), rather than to the state's Department of Revenue. The taxpayer receives a credit against income taxes for the full amount transferred to the STO. The STO must, in turn, use the tax revenues transferred to it to provide scholarships for students attending non-public schools, including religious schools.

Under the Arizona program, STOs need not take financial need into account in awarding scholarships.

[3] The text of § 1089 is set forth in the petition for certiorari at Pet. App. 37-App. 38.

[4] The amount for married taxpayers filing jointly is $625. Ariz. Rev. Stat. § 43-1089(A)(2), Pet. App. 27.

Moreover, each STO may (and almost all do) limit the scholarships they award to students attending schools of a particular religious denomination and/or to students of a particular religious faith. Plaintiffs' complaint alleged, for example, that in the first full year of § 1089's operation, at least 94% of the tax revenues transferred to STOs went to religion-specific STOs – i.e., STOs that restrict their grants to students attending religious schools of a specific religious denomination. Pet. App. 14.

The Arizona program thus differs significantly from the Ohio program recently upheld by this Court in *Zelman v. Simmons-Harris*, 526 U.S. 639 (2002). Unlike the program in *Zelman*, the Arizona program is limited neither to students with financial need nor to students attending substandard schools. In Arizona, by contrast, tax revenues can be and are used to subsidize religious school tuition for students from affluent families and for students who are already attending excellent private schools. Nor (again unlike the situation in *Zelman*) does the Arizona program provide support for academic programs at public as well as private schools; § 1089 permits tax revenues to be diverted only to *non*-public schools. *See* Ariz. Rev. Stat. Ann. § 43-1089(E)(2), at Pet. App. 38.[5] Finally, as noted above, under the Arizona program scholarships may be awarded on a religiously discriminatory basis. STOs need not be open to applications from all eligible students, but may discriminate on the basis of religion, and they ordinarily restrict grants to students who

[5] Arizona does have a program under which a considerably smaller tax credit ($200) is given for payments supporting only *extra-curricular* activities – such as sports teams or class trips – at public schools. Respondents do not challenge that program.



wish to attend schools of a particular religious denomination.[6] Under the *Zelman* program, by contrast, eligible students are considered by the state for vouchers without regard to their religion, without regard to whether the school they wish to attend is religious or non-religious and, if the school is religious, without regard to the religious affiliation of the school.

2. *District Court Proceedings.* – Respondents challenged this program under the Establishment Clause by bringing suit in the United States District Court for the District of Arizona. They sought declaratory and injunctive relief prohibiting the state from using § 43-1089 to divert state income-tax revenues to religious uses. Pet. App. 14. Petitioner moved to dismiss on the basis of the federal Tax Injunction Act, 28 U.S.C. § 1341, which provides that federal district courts shall not "enjoin, suspend or restrain" the "assessment, levy or collection of any tax under state law" when an adequate remedy is available in state courts. The district court granted this motion on the ground that respondents' suit constituted an attempt, barred by the Tax Injunction Act, to restrain the "assessment" of state income taxes in federal court. Alternatively, the court held that principles of federal-state comity prohibited federal district court jurisdiction over any attack on the constitutionality of a state tax law. Pet. App. 17, 23.

[6] In the first year of the Arizona program's operation, more than 46% of the credited funds went to the Catholic Tuition Organization of the Roman Catholic Diocese of Phoenix, which provides scholarships only to students attending schools run by the Diocese. Pet. App. 14. An eligible student may therefore fail to receive a scholarship solely because of his or her religion or because he or she does not want to attend a religious school.

3. *The Decision Below.* – A unanimous panel of the court of appeals reversed and remanded for further consideration of respondents' claim. With regard to application of the Tax Injunction Act, the court of appeals noted that petitioner's invocation of that Act was based entirely on the assertions (1) that plaintiffs' suit sought to enjoin the "assessment" of Arizona income taxes and (2) that "assessment" means "the overall calculus by which the state determines how much revenue it will receive from each taxpayer." Pet. App. 16.

The court of appeals found this reading to be "supported neither by any precedent interpreting 'assessment' in this manner, nor by the meaning of the word [assessment] itself." *Ibid.* More fundamentally, the court observed that, if respondents were to obtain relief from the district court in this case, "there would be no violation of the purposes or policy underlying the Tax Injunction Act." Pet. App. 18. One of these purposes, as shown by the Act's legislative history, was to eliminate the ability of nonresident taxpayers to use the federal diversity jurisdiction to litigate state tax cases in federal rather than state court, so as to avoid state "pay first-litigate later" rules. That purpose was irrelevant to this case. *Ibid.* A second principal purpose was to prevent federal district judges from disrupting a state's collection of tax revenues. The invalidation of a tax credit, however, unlike the invalidation of a tax itself, could not adversely affect or in any way undermine the state's ability to raise revenue. Pet. App. 20. The court therefore found that Arizona's broad argument that the Tax Injunction Act bars "any federal litigation regarding the constitutionality of state taxes" was inconsistent with precedent, the language of the Act, and the expressed congressional purpose. Pet. App. 21.



The court of appeals also rejected the district court's use of the principle of federal-state comity to preclude original federal jurisdiction here. Pet. App. 23-25. The court recognized that this Court has twice used a comity principle to bar district court jurisdiction in cases in which the constitutionality of a state tax law was challenged. Both of these cases,[7] however, were ones "in which the plaintiffs sought to stop the collection of a tax" thus violating an expressed purpose of the Tax Injunction Act. Pet. App. 23. By contrast, the tax provision challenged in the instant case "is a limited, discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes . . . and would, in fact, produce substantial additional revenue for the state." Pet. App. 26. Arizona had thus identified "no harm that renders federal court review of this statute any more intrusive on the state's sovereignty than the review of any other state statute that is alleged to be unconstitutional. Accordingly, comity does not bar plaintiffs' attempt to vindicate the important constitutional rights at issue." *Ibid.*

[7] The cases are *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), and *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100 (1981).

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. THE PETITION FOR CERTIORARI IS JURISDICTIONALLY UNTIMELY

The judgment of the court of appeals that petitioner is asking this Court to review was entered on October 3, 2002. A petition for writ of certiorari seeking review of that judgment was required to be filed within 90 days after the date judgment was entered, unless "a petition for rehearing was timely filed in the lower court by any party," in which case the time to petition would run "from the date of the denial of the petition for rehearing." 28 U.S.C. § 2101(c); Sup.Ct. R. 13.1, 13.3. Neither party petitioned the court of appeals for rehearing or rehearing en banc. The time to petition for certiorari therefore expired in this case on January 2, 2003 (January 1, the ninetieth day, was a holiday). The petition here was not filed, however, until June 3, 2003, more than five months after the time to petition had expired.

Failure to comply with the statutory time limit for filing a certiorari petition in a civil case is a non-waivable jurisdictional defect. *See, e.g.*, Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 348 (8th ed. 2002) ("The time limitations prescribed by Congress, as in 28 U.S.C. § 2101(c) with respect to all civil cases, make the untimely filing of a petition a jurisdictional defect."); *Moore's Federal Practice*, § 513.03[1][a] (3rd ed.) and note ("A petition is considered jurisdictionally out of time . . . if it is filed after the expiration of a time limitation imposed by Act of Congress"; "28 U.S.C. § 2101(c) . . . makes jurisdictional the time to file petition for writ of certiorari in civil case."); Fallon, et al., *Hart & Wechsler's The Federal Courts and the Federal System 1684* (4th ed. 1996) ("the statutory limitations for certiorari and appeal, which are set forth in 28 U.S.C. § 2101(c), are regarded as jurisdictional").



This Court has repeatedly emphasized the non-waivable and jurisdictional nature of the time limit for petitioning for certiorari in civil cases. *See, e.g., Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (stating that an untimely petition in a civil case "must . . . be denied for want of jurisdiction"); *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 91-97 (1994); *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990); Stern, Gressman, et al., *supra*, at 348-349 ("This jurisdictional requirement of timeliness is strictly applied [by this Court] in civil cases. No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained.") (citing *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1974) (declining to entertain a petition when an airline lost the applicant's papers); *Teague v. Commissioner of Customs*, 394 U.S. 977 (1969) (declining to entertain a petition when a snowstorm caused a postal delay). *See also Schacht v. United States*, 398 U.S. 58, 65 (1970) ("In the absence of language providing for waiver, we have without exception treated the statutory limitations as jurisdictional.") (Harlan, J., concurring.) This Court's Rule 13.2 accordingly provides that "The Clerk *will not file* any petition for a writ of certiorari that is jurisdictionally out of time" (emphasis added).

Petitioner appears to have mistakenly based the filing date of his petition on his belief that the petition seeks review of the action taken by the court of appeals on March 5, 2003, when the court denied a circuit judge's *sua sponte* request for rehearing en banc. Thus the first paragraph of the petition states that petitioner "requests that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Ninth Circuit *entered in this case on March 5, 2003*" (emphasis added). That statement is incorrect. The petition here seeks review, not of the court of appeals' March 5, 2003, denial of en banc rehearing, but of the judgment of the court of appeals, which was entered on October 3, 2002, and the time within which a certiorari petition must be filed runs from the date of that judgment. Sup.Ct. R. 13.3.

It is true that this Court's rules provide for extending the time period during which a certiorari petition may be filed "if a petition for rehearing is timely filed in the lower court by any party." *Ibid.* That provision, however, is inapplicable here for at least two reasons. First, no rehearing request was filed here by a party, as Rule 13.3 requires. Neither petitioner nor respondents petitioned for rehearing or rehearing en banc in the court of appeals. The only en banc request in this case was made, *sua sponte,* by a judge of the circuit, presumably one who was not a member of the unanimous panel. The rules and procedures of the Fifth, Sixth, Ninth, Eleventh, District of Columbia and Federal Circuits all expressly provide for or recognize the possibility of such *sua sponte* en banc requests,[8] and Rule 35(a) of the Federal Rules of Appellate Procedure appears to authorize them in all events. By specifying that the time to petition for certiorari is extended beyond the statutory period of ninety days only when a timely rehearing petition is filed in the court of

[8] *See* 5th Cir. R. 35.6; 6th Cir. R. 35(a) and (c); 9th Cir. Gen. Ord. 5.4(c); 11th Cir. R. Rule 35-5; D.C. Cir. Internal Operating Proc. XIII(B)(2); Fed. Cir. R. 35 proc. notes.



appeals "*by any party*," Rule 13 appears expressly to prohibit extensions of the time to petition for certiorari during the pendency of *sua sponte* en banc requests. Rule 13 thus may reflect the fact that, unlike the situation where a party requests rehearing, neither FRAP Rule 35 nor the rules of most circuits stipulate the time period during which a *sua sponte* en banc request must be made, nor do they require that the parties be informed of the pendency of such a request.[9] Extending the ninety-day statutory period for filing a certiorari petition during the pendency of *sua sponte* en banc requests would therefore indefinitely extend the time during which a petition for certiorari might be filed and also extend the period during which the court of appeals' decision would lack finality. In all events, the jurisdictional nature of the ninety-day statutory period for seeking certiorari in civil cases and the completely clear language of Rule 13.3 clearly mean that only rehearing petitions by a *party* can extend the time to petition.

Secondly, even if timely *sua sponte* rehearing requests were to be deemed to extend the time for seeking certiorari, the *sua sponte* request in this case appears not to have been a timely one. The Ninth Circuit's procedures specify that a *sua sponte* en banc request must be made "within seven days of the expiration of the time for filing a petition for panel rehearing." As the rules go on to explain, "[t]his means the *sua sponte* call must be made within 21

[9] A time limit for *sua sponte* en banc requests seems to be present only in the Ninth Circuit. Furthermore, only the Ninth Circuit requires that the parties be informed of a *sua sponte* call for rehearing en banc. 9th Cir. Gen. Ord. 5.4(c)(3).

days of the filing of the panel's decision . . . . " 9th Cir. Gen. Ord. 5.4(c)(3). Although the circuit's rules further provide that, by making a "stop clock" request, a judge "may extend the time in which to make an en banc call for 14 days," "[o]nly one such delay is permitted." In addition, a judge making a "stop clock" call must "direct the Clerk of Court or any person the Clerk may designate to stay the mandate and notify the panel. . . . Otherwise the mandate will issue pursuant to F.R.A.P. 41(a) and en banc procedures will terminate." 9th Cir. Gen. Ord. 5.4d.

The court of appeals' mandate in this case was issued on October 25, 2002, one day after the deadline imposed by Rule 41(b) of the Federal Rules of Appellate Procedure. The issuance of the mandate strongly indicates that no timely "stop clock" call was made since, if such a call was made, the Clerk would not have issued the mandate. The Clerk's order of October 28, 2002, recalling the mandate does not explain the reasons for the recall, except to state that the issuance of the mandate was "in error." Op. App. 1. Although courts of appeals have inherent power to recall their mandates, that power can be exercised "only in extraordinary circumstances" involving "grave, unforeseen contingencies." *Calderon v. Thompson,* 523 U.S. 538, 550 (1998), reversing 151 F.3d 918 (9th Cir. 1997). No such contingencies were present in this case. It is likely, therefore, that en banc procedures terminated in the Ninth Circuit on October 25, 2002. Moreover, even if a timely "stop clock" call was made and the mandate was properly recalled, the time in which a timely *sua sponte* en banc request could be made would have been extended only until November 7, 2002. The court's supplemental briefing order, however, which the Ninth Circuit requires to be entered "upon receipt" of a *sua sponte* en banc request, 9th



Cir. Gen. Ord. 5.4(c)(3), was not entered until November 13, 2002, almost a week after the latest possible date on which a timely *sua sponte* call could have been made.

These confusing and unexplained delays, in the one circuit that has adopted time limits and notification requirements for *sua sponte* en banc requests, reinforce the need to respect the clear language and the jurisdictional character of 28 U.S.C. § 2101(c) and Supreme Court Rule 13. Pursuant to these provisions, the petition for certiorari in this case was untimely and the Court has no jurisdiction.

## II. THE DECISION BELOW WAS CLEARLY CORRECT

The court of appeals' decision that the Tax Injunction Act is not applicable to this case was clearly correct. The Act does not bar district court jurisdiction over all constitutional challenges to any aspect of state tax legislation, as petitioner contends, but only over cases in which the district court is asked to restrain the "*assessment, levy or collection*" of state taxes. By seeking to invalidate, not a tax, but an unconstitutional credit against income taxes due, plaintiffs' suit would do none of these things.

Contrary to petitioner's argument, the removal of the STO credit from the credits that may be subtracted on a taxpayer's return from the balance of taxes owed to Arizona will have no effect whatsoever on Arizona's ability to "assess" taxes. Removing the STO credit will not change Arizona's definition of gross taxable income. It will not change the amount or character of the deductions from gross income that may be made in computing taxable income. It will not change the tax rates applicable to that

taxable income, or the methods for calculating the taxes that are due. Nor will plaintiff's suit result in any interference with Arizona's ability to "levy" or to "collect" any tax. To the contrary, if respondents are successful Arizona's future state income tax revenues will be significantly increased by the cancellation of an unconstitutional credit against income taxes due.

Respondents' complaint asks the district court (i) to declare the STO tax-credit provision unconstitutional, (ii) to enjoin defendant from permitting taxpayers to claim the credit in the future, and (iii) to order the defendant to inform STOs that they must return tax revenues in their possession (i.e., amounts they have not yet awarded as scholarships) to the state general fund. This relief would in no way interfere with Arizona's ability to assess, levy or collect its income tax. Defendant would simply need to remove the STO credit from the list of credits that taxpayers may claim on their state income-tax returns in future years and inform STOs of their obligation to return tax funds in their possession to the state. The result of the defendant's compliance with such an order would be to increase both state income-tax revenues and the amount in the state general fund. No delay or other interference with tax assessment or collection would occur. The Tax Injunction Act is inapplicable in such a situation.

This Court recently unanimously explained, in an opinion by Justice Ginsburg, that a suit to collect a state tax from federal judges, challenged as a violation of the Constitution's intergovernmental tax immunity doctrine, is not barred by the Tax Injunction Act because it does not seek "to stop . . . the collection of taxes." *Jefferson County v. Acker*, 527 U.S. 423, 433, 435 (1999). As the Eighth Circuit has held, the same is true of a suit seeking a



district court order raising state property and income taxes as part of a desegregation remedy because the Tax Injunction Act is "inapplicable to efforts to require collection of additional taxes as opposed to efforts to inhibit the collection of taxes." *In re Jackson County*, 834 F.2d 150 (8th Cir. 1987). Numerous other district and circuit court cases have reached the same conclusion. *See, e.g.*, *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996) (suit challenging the exemption of religious organizations from state unemployment tax is not barred by the Tax Injunction Act); *Moton v. Lambert*, 508 F. Supp. 367, 368 (N.D. Miss. 1981) (Tax Injunction Act is inapplicable to a suit challenging a state property-tax exemption for racially discriminating private schools); *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir. 1980) (Tax Injunction Act is inapplicable to a suit seeking a declaration that a power plant is subject to state tax); *Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969) (suit to "order the collection and disbursement of certain county tax monies" is not barred by the Tax Injunction Act). It is only in cases where the federal remedy threatens actually to interfere with a state's ability to obtain tax revenue that the Act's prohibition applies. In other cases, Congress has given plaintiffs the right to choose a federal forum for litigation of their federal constitutional claims.[10]

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[10] *See, e.g.*, 42 U.S.C. § 1983. Scholarly commentary is in complete agreement with the Ninth Circuit's reading of the Tax Injunction Act. *See, e.g., Moore's Federal Practice* (3d ed.) 57.25[2][b] ("A suit *to collect* tax is not one brought to restrain state action; therefore, it is not within the Act's description of suits that are barred from adjudication by federal courts"); *Id.*, § 121.41[1] (The Act "seeks to avoid interference by federal courts that would 'threaten the flow of general revenue to or the

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In asking this Court to review the decision below, the petitioner and amici focus their attention on the meaning of the word "assessment" in the Act, as did Judge Kleinfeld in his dissent from the circuit's decision not to rehear the case en banc. Although they recognize that dictionaries contain a number of definitions of the term, they contend that "assessment" should be defined broadly to encompass everything having to do with state taxation. Proper statutory construction, however, requires that unclear words in a statute be construed to accomplish legislative intent. The Tax Injunction Act was expressly designed by Congress to prevent taxpayers who challenge the validity of state taxes from using federal courts to obtain injunctive relief that would withhold tax revenues from states and their subdivisions so "as to seriously disrupt state and county finances." S.Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937). The application of the term "assessment" by the court of appeals in this case is completely consistent with that intent.

Significantly, in interpreting the term "assessment," neither petitioner nor his amici refer to the intent of Congress in adopting the Tax Injunction Act. Nor do they advert to two of the fundamental rules of statutory construction – *noscitur a sociis* and *ejusdem generis*. Under the former doctrine, when general words are used in association with more specific words, the general words

budgets of state governments.' "); Wright, et al., *Federal Practice and Procedure* § 4237 (2nd ed. 2001); Fallon, et al., *Hart & Wechsler's The Federal Courts and the Federal System* (4th ed. 1996) p. 1216 ("Congress was ... concerned that taxpayers, with the aid of a federal injunction, could withhold large sums, thereby disrupting governmental finances.").



take on the restricted meaning analogous to the more specific words. As the Court said in *Jarecki v. G.D. Searle & Co.*: "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings *in order to avoid the giving of unintended breadth to the Acts of Congress*." 367 U.S. 303, 307 (1961) (emphasis supplied). Similarly, under the principle of *ejusdem generis*, specific terms in a statute govern general terms. *U.S. v. Parker*, 30 F.3d 542 (4th Cir. 1994), *cert. denied*, 513 U.S. 1029 (1994).[11] Thus, when the Tax Injunction Act bars federal suits to enjoin the "assessment, levy or collection" of any state tax, the term "assessment" is to be given a meaning that relates to the "levy" and "collection" of taxes. To interpret "assessment" as encompassing the entire tax structure of the state, as petitioner and amici would do, is inconsistent both with the expressed intent of the Act and with these basic principles of statutory construction.

The court of appeals was also clearly correct in rejecting the argument that principles of comity foreclose district court jurisdiction here. As the decision below explained, Pet. App. 23, the applicable comity principle, like the Tax Injunction Act, bars federal jurisdiction only where the relief sought would constitute actual interference with a state's collection of revenue. Both Supreme Court cases in which comity has been invoked to bar federal jurisdiction over challenges to state taxes were

[11] These two axioms of judicial construction are often considered together as corollaries. *See, e.g., Cortez v. University Mall Shopping Center*, 941 F. Supp. 1096 (D. Utah 1996).

thus cases in which plaintiffs "sought to stop the collection of a tax." *Ibid. See Great Lakes Dredge & Dock Co. v. Hoffman*, 319 U.S. 293 (1943); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981).

Since the first of these cases was decided, this Court has twice entertained important Establishment Clause challenges to state tax credits or deductions in cases that originated in federal district courts. *See Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Mueller v. Allen*, 463 U.S. 378 (1983). *See also Griffin v. Prince Edward County*, 377 U.S. 218 (1964), affirming a federal district court's injunction against a county's allowance of tax credits for taxpayer contributions to racially segregated private schools. A unanimous Court in *Griffin* had "no doubt of the power of the court to give this relief. . . . It has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights. . . . The injunction against . . . giving tax credits . . . is appropriate . . . " 377 U.S. at 232-233. No member of the Court mentioned either the Tax Injunction Act or comity as a jurisdictional barrier to relief striking down the unconstitutional tax credit.

*Nyquist* and *Mueller* are this Court's two cases most closely related to the Establishment Clause issues raised in the present case. *Nyquist* struck down a New York income-tax credit for private and religious school expenses; *Mueller* upheld a Minnesota income-tax deduction for religious school expenses. Both of these cases were initiated in federal district courts. *See Committee For Public Education v. Nyquist*, 350 F. Supp. 655 (S.D.N.Y. 1972); *Mueller v. Allen*, 514 F. Supp. 998 (D. Minn. 1981). *Nyquist* came directly to this Court from a three-judge district court; *Mueller* was reviewed in the court of appeals



before coming here. *Mueller v. Allen*, 676 F.2d 1195 (8th Cir. 1982). If petitioner and amici are correct that the Tax Injunction Act and principles of comity bar federal district court jurisdiction in this case, jurisdiction would also have been precluded in *Nyquist* and *Mueller*. Yet none of the many opinions in either of these thoroughly well-litigated cases suggests the relevance of the Tax Injunction Act or comity principles. This omission is especially striking with regard to *Mueller*, in which the opinion of the Court was written by then-Justice Rehnquist who, less than two years earlier, had written the Court's important opinion in *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100 (1981). The *McNary* opinion fully explored the history and scope of the Tax Injunction Act and applied comity principles to preclude district court jurisdiction in a case threatening direct interference with state tax collection. If either the Act or principles of comity precluded a federal district court suit challenging an unconstitutional tax credit or deduction, there seems little doubt that the Court would have noticed that serious jurisdictional defect in *Mueller*.

## III. THERE IS NO SIGNIFICANT CONFLICT IN THE CIRCUITS; THE RECENT DECISION OF THE FIFTH CIRCUIT IS AN ANOMALY

Like the court below, other federal courts of appeals have, with the single exception of a Fifth Circuit panel decision rendered after the decision below in this case, consistently construed the Tax Injunction Act as applicable only where the remedy sought would threaten some actual interference with a state's ability to collect tax revenue. The basic distinction between suits that seek to prevent tax collection, to which the Act applies, and suits seeking remedies that do not interfere with tax collection, to which

the Act does not apply, has been consistently recognized in the courts of appeals.

Thus in *Dunn v. Carey*, the Seventh Circuit, in an opinion by Judge Easterbrook, held that "[t]he Tax Injunction Act applies *only to requests that federal courts interfere with the collection of state taxes*." 808 F.2d 555, 557 (7th Cir. 1986) (emphasis added). The Seventh Circuit specifically rejected the contention (identical to the argument that petitioner makes here) that the Act "applies to any federal litigation touching on the subject of state taxes." Judge Easterbrook explained that "neither the language nor the legislative history of the statute supports this interpretation. The text of 28 U.S.C. § 1341 does not suggest that federal courts should tread lightly in issuing orders that might allow governments to raise additional taxes." 808 F.2d at 558.

The Fifth Circuit, prior to its recent panel decision, had adopted the same reading, concluding that, "under Fifth Circuit precedents, § 1341 is inapplicable to the present case *because it seeks not to inhibit the collection of taxes, but to require the collection of additional taxes.*" *Appling County*, 621 F.2d at 1303-04 (emphasis added). The Second, Third, Fourth, and Tenth Circuits have all reached the same conclusion. *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975) (Friendly, J.) ("In speaking of 'collection' [in the Tax Injunction Act], Congress was referring to methods similar to assessment and levy, e.g., distress or execution ... that would produce money or other property directly [to the State]."); *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1191 (10th Cir. 1998) (Tax Injunction Act applies to claims for "injunctive relief against state or local taxes"); *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 403 (3rd Cir. 1982) ("The policy of non-interference with state



revenue collection served by the Tax Injunction Act applies fully to attempts to enjoin withholding, which often comprises an essential administrative mechanism for the orderly collection of taxes."); *Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 301 (4th Cir. 2000) (Tax Injunction Act reflects "Congress's desire to keep federal courts from *unduly interfering with state revenue collection*") (emphasis added); *In re Jackson County*, 834 F.2d 150, 151 (8th Cir. 1987), the Tax Injunction Act "has been held to be *inapplicable to efforts to require collection of additional taxes*, as opposed to efforts to inhibit the collection of taxes" (emphasis added).

Petitioner cites three cases as support for the contention that a conflict in the circuits exists: *United States Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979); *In re Gillis*, 83 F.2d 1001 (6th Cir. 1988); and *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237 (11th Cir. 1982). *Perez* was decided, not under the Tax Injunction Act, but under a jurisdictional statute applicable only to the Commonwealth of Puerto Rico. The case involved a challenge to a tax increase on beer that exempted local beer producers. The court observed that the plaintiffs' request for relief "could be formed in two ways, either by ordering the state not to collect the tax increase or by requiring the state to levy the tax hike on exempt as well as nonexempt parties." The court noted that the first (and most probable) form of relief would directly restrain the collection of tax, while the second would result in the district court's creation of a "broad taxing statute for which the Commonwealth may have believed there was no need or which was actually detrimental to its domestic policy."

The situation in the present case is wholly dissimilar. The relief respondents seek cannot possibly restrain the

collection of state taxes, would not impose any new tax on any Arizona citizen, and would work no basic change in Arizona income-tax policy. Similarly, in *Colonial Pipeline Co.*, the Eleventh Circuit applied the Tax Injunction Act because the requested relief, if granted, "would require a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system." Nothing remotely comparable is present here.

In *Gillis,* the Sixth Circuit did not base its decision on the Tax Injunction Act. It applied comity principles to preclude federal jurisdiction in a case that challenged the entire ad valorem tax system of the state of Kentucky. The court of appeals observed that, if the plaintiffs prevailed, there "the district court would be forced to issue a declaratory judgment finding that virtually all property owners in the state of Kentucky had been deprived of their right to equal protection under the United States Constitution by the manner in which petitioners administered the state tax system." 836 F.2d at 1008. Plaintiff's requested injunctive relief would have required petitioners "to reassess all real and personal property owned by coal, oil and gas interests." *Id.* at 1009. The *Gillis* court concluded that, in these circumstances, "the interference by the federal courts into the state tax system is the *same in degree and kind as a suit seeking to enjoin a state tax.*" *Id.* at 1008 (emphasis added).

*Gillis* thus explicitly relied on the presence of the same revenue-destructive factors that this Court has recognized as the basis for applying comity principles to preclude district court jurisdiction. These revenue-destructive factors are obviously not present here. *Gillis,* like *Perez* and *Colonial Pipeline*, is completely consistent with the court of appeals' decision in the present case –



federal district court jurisdiction is precluded only where the relief requested would interfere with the state's ability to collect tax revenues.

In a supplemental filing, petitioner has informed the Court of the June 11, 2003 Fifth Circuit opinion in *American Civil Liberties Union v. Bridges,* No. 02-30493, 2003 WL 21362357 (5th Cir. 2003). In that case, decided after the petition for certiorari here was filed, Louisiana had created exemptions in several state tax statutes for religious activities. These exemptions were challenged as violations of the Establishment Clause. The district court, following established precedent, found that the Tax Injunction Act did not apply because plaintiff was not seeking to restrain the "assessment, levy or collection" of state taxes but to eliminate unconstitutional tax exemptions. The Fifth Circuit reversed, broadly stating that the Tax Injunction Act prevents a district court from hearing a suit "seeking to prevent the state from carrying out the current tax system by having a portion of that tax system declared unconstitutional." 2003 WL 21362357 at p. 5.

While the Fifth Circuit saw its decision as inconsistent with the Ninth Circuit's decision in the present case, there are at least two important factual differences. First, the Fifth Circuit in *Bridges* recognized that the district court's decision there could, in practical effect, result in loss of tax revenue to the state: "[I]t is not necessarily true that declaring the [Louisiana] exemptions to be unconstitutional will result in the State collecting more taxes. . . . In fact even as the ACLU argues, just the opposite could occur, the State may resolve any putative constitutional problems created by the challenged statutes by exempting more entities and therefore collecting less taxes." *Ibid.*

This potential for loss of state revenue as a result of federal district court action is not present here.

A second distinction between *ACLU v. Bridges* and the present case is the difference between tax exemptions and tax credits. Exemptions are part of the process of establishing the amount of the taxpayer's tax obligation; credits are a means of satisfying that obligation once it is established. It is possible, therefore, to characterize a challenge to an exemption as a challenge to the process of "assessing" the amount of income tax that is due to the state. Even under such a broad definition of "assessment," however, the application of a credit toward satisfaction of the tax obligation would not be part of the tax "assessment" process.

While the Fifth Circuit's language may be inconsistent with the decision below in this case, its holding thus may not create a conflict. In all events, one recent opinion of one circuit that is out of step with the decisions of all other circuits to have considered the question, as well as with the opinions and decisions of this Court, does not call for review of the decision below in this case. The decision below is consistent with decisions in every other circuit and with this Court's actions in *Griffin, Nyquist* and *Mueller*. It is a clearly correct application of the Tax Injunction Act and prevailing comity principles.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| KATHLEEN M WINN, an Arizona taxpayer, et al.,<br>Plaintiffs-Appellants,<br>v.<br>MARK W KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,<br>Defendant-Appellee. | No. 01-15901<br>D.C. No. CV-00-00287-EHC<br>District of Arizona, Phoenix<br>ORDER<br>(Filed Oct. 28, 2002) |

The mandate issued on October 25, 2002 in the above captioned appeal was in error and is RECALLED.

FOR THE COURT:

Cathy A. Catterson
Clerk of Court

/s/ Pinky Argonza

By: Pinky Argonza
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MARUICE [sic] WOLFTHAL, an Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer,

Plaintiffs-Appellants,

v.

MARK W KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,

Defendant-Appellee.

No. 01-15901
D.C. No. CV-00-00287-EHC
ORDER
(Filed Nov. 13, 2002)

Before: SCHROEDER, Chief Judge, D.W. NELSON and REINHARDT, Circuit Judges

The parties are directed to file simultaneous briefs setting forth their respective positions on whether this case should be reheard en banc. The briefs shall not exceed fifteen (15) pages and shall be filed within twenty-one (21) days from the filed date of this order. Fifty (50) copies should be filed.